

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|------------------------------------|---|--------------------|
| JANICE EMERSON |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| WAL-MART |) | |
| Respondent |) | Docket No. 255,398 |
| |) | |
| AND |) | |
| |) | |
| AMERICAN HOME ASSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated January 10, 2002. The Board heard oral argument in Topeka, Kansas, on July 23, 2002.

APPEARANCES

Claimant appeared pro se. Matthew Weaver of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded the claimant a 5 percent permanent partial loss of use of the left forearm.

Claimant argues she did not receive a fair and impartial hearing because her attorney did not submit medical evidence from her doctors and that statements in respondent's submission letter were incorrect. Claimant, in her brief, contends she was grossly misrepresented by her attorney due to his failure to submit medical evidence to rebut the respondent's doctor's testimony. Claimant concludes the record should be reopened for consideration of her doctor's reports. Lastly, claimant requests reimbursement for her expenses incurred to request and prepare for the review before the Board.

Respondent argues the uncontroverted evidence supports the Administrative Law Judge's Award which should be affirmed. Respondent further argues introduction of additional evidence on review to the Board is not permissible. Lastly, respondent argues claimant has the remedy of a malpractice action against her former attorney if she was inadequately represented in her workers compensation claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the Administrative Law Judge's Award should be affirmed. The Board agrees with the Administrative Law Judge's analysis of the evidence as set forth in the Award. The Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

The sole controverted issue before the Administrative Law Judge was the nature and extent of disability. The Board agrees with the Judge's determination that the uncontroverted medical evidence of Michael Poppa, D.O., establishes that as a result of claimant's work-related injury she suffered a 5 percent loss of use of her left forearm.

The claimant argues the Award contains an incorrect date of accident. She notes that she testified her accident actually occurred in January instead of the stipulated date of February 27, 1999. Although she did testify the accident occurred in January, nonetheless, the parties stipulated to a date of accident of February 27, 1999. Because it was stipulated claimant suffered accidental injury arising out of and in the course of her employment, the accident date used does not affect claimant's entitlement to benefits. Moreover, claimant never requested the stipulation be withdrawn.

Claimant next takes issue with the arguments contained in the respondent's submission letter and argues certain statements are not supported by the record. A submission letter is merely a party's argument based upon their view of the facts and the

law. It is intended to define the controverted issues and explain the party's position on the issues. However, such submission letters as well as the briefs filed with the Board are not part of the evidentiary record. The evidentiary record consists of the transcripts of hearings held, the testimony presented to the Administrative Law Judge or by evidentiary deposition and the exhibits received into evidence. Because the Administrative Law Judge's decision as well as the Board's decision on review is based on the record and not on the contents of the submission letters or briefs, any of the statements or misstatements of the record which are contained in those documents are harmless and do not require reversal of the Administrative Law Judge's Award.

In this case the evidentiary record consisted solely of the transcript of regular hearing taken August 28, 2001, and the evidentiary deposition of Michael J. Poppa, D.O., taken December 11, 2001. Accordingly, the decision must be and was confined to the evidence contained in those two records.

Claimant's primary argument was that she was not adequately represented by counsel. She argues her counsel failed to rebut Dr. Poppa's testimony by introducing her doctor's report. She further notes her attorney did not contest Dr. Poppa's testimony.¹

Claimant filed a document with the Board which contained allegations about the quality of representation her former attorney had provided in this case. At oral argument claimant was advised the Board does not have the responsibility to investigate such complaints and claimant noted she had incorrectly forwarded the letter to the Board and that she had subsequently sent the complaint to the Disciplinary Administrator's office. That is the appropriate agency to resolve claimant's complaints against her attorney.

The Kansas Disciplinary Administrator's Office is a state agency in the judicial branch working under the direction of the Kansas Supreme Court. It is the Disciplinary Administrator's responsibility to investigate complaints against Kansas attorneys. Conversely, it is not the function of the Board on review to determine the adequacy of representation a claimant has received. Nor is it a function of the Board to review an attorney's trial tactics regarding the submission or failure to submit evidence.

Claimant next requests the record be opened for submission of her doctor's reports. Workers compensation proceedings have been and remain adversarial proceedings.² In a workers compensation proceeding, the claimant has the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the

¹ Although Dr. Poppa's deposition was scheduled by agreement of the parties, the claimant's attorney did not appear for the deposition. Although respondent offered to reschedule the deposition, claimant's attorney's office advised respondent to proceed with the deposition.

²Roberts v. J.C. Penney Co., 263 Kan. 270, 281, 949 P.2d 613 (1997).

claimant's right depends.³ The “burden of proof” is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”⁴

The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. All the evidence is presented to the Administrative Law Judge. K.S.A. 44-523(b) provides for establishment of terminal dates for completion of the submission of evidence. After the parties have fully submitted the evidence, the Administrative Law Judge issues a decision based on the record. Although the Board conducts a de novo review, it is solely on the record made before the Administrative Law Judge.⁵

The Administrative Law Judge had established terminal dates for the submission of the evidence. No requests for extensions were made by the claimant. After the evidence was submitted, the Administrative Law Judge reviewed the evidence and entered his Award. At this stage of the proceedings, the Board cannot receive new evidence but must make an independent adjudication of the facts and law based upon the record developed before the Administrative Law Judge.

Lastly, at oral argument before the Board, the claimant requested that her expenses incurred to request and prepare for Board review be reimbursed by respondent. It is axiomatic that each party must pay its own litigation expenses unless a statute provides otherwise. In the absence of such statutory authority and because review before the Board is part of the initial and original claim for compensation, the claimant must pay for her own litigation expenses incurred to perfect her appeal to the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 10, 2002, is affirmed.

IT IS SO ORDERED.

³K.S.A. 44-501(a).

⁴K.S.A. 44-508(g).

⁵K.S.A. 44-555c(a).

Dated this _____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Janice Emerson, Pro Se
Matthew Weaver, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation